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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,
AFL-CIO, *et al.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR AMERICAN TRUCKING ASSOCIATIONS, INC. AS AMICUS CURIAE

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BRIEF FOR AMERICAN TRUCKING ASSOCIATIONS, INC. AS AMICUS CURIAE

Certiorari was granted on January 21, 1980 and an expedited briefing schedule was established. This brief is filed by American Trucking Associations, Inc. (ATA), the national organization of the motor carrier industry, on behalf of all carriers regulated by the Interstate Commerce Commission which participate in the intermodal transportation of containerized freight for export or import. The concerns of these motor carriers lie at the heart of the dispute at bar and therefore may be helpful to this Court in resolving the important questions presented by this litigation. ATA has received

written consent to submit this brief as amicus curiae from all parties before the court of appeals. Copies of these consents are on file with the Clerk.

QUESTION PRESENTED

Whether the court of appeals erred in finding that the National Labor Relations Board improperly interpreted and applied the Supreme Court's work preservation doctrine by merely substituting its judgment for the Board's as to "all surrounding circumstances" which must be considered, including consideration of work patterns developed within the motor carrier industry for interchanging containerized freight with the ocean shipping industry.

STATEMENT

At issue are contract provisions negotiated by the International Longshoremen's Association (ILA) with their employers in the steamship industry. Under these provisions, steamship companies or associations are obligated to pay a fine as liquidated damages on each container that is "stripped" or "stuffed" off-pier, within 50 miles of the center of relevant ports, by anyone other than ILA employees.[1]

Parallel to the ILA work on-pier, the motor freight industry traditionally performed substantial off-pier cargo sorting in conjunction with transportation of interchanged freight for their customers and cargo consolidators, as well as for shipping companies. Since containerization, that work now involves stripping and stuffing containers. These operations are now deemed by

[1] The current Rules on Containers, in effect since 1974, clarify that stripping and stuffing—packing and unpacking cargo into and from individual containers—is permitted off-pier by employees of the cargo's beneficial owner. The entire rules are printed as Appendix B to the court of appeals' decision, contained in the appendix to the Solicitor General's petition (hereafter "Pet. App."). Pet. App. 67a-79a.

ILA to conflict with their asserted right to such work under the Rules on Containers.[2]

Consequently, shipping companies assessed fines because of off-pier container work not performed by ILA employees have sought reimbursement from motor carriers. Carriers generally have refused to pay these indirect penalties, inasmuch as they are guaranteed complete control and supervision of containers in their possession under the Uniform Intermodal Interchange Agreement.[3] Additionally, the standard bill of lading utilized in the trucking industry specifies that carriers have the right to transfer cargo among containers and trailers as necessitated by business judgment or as required by the freight's owner. Nevertheless, steamship companies have responded to unpaid assessments or threats of further assessments by ILA by cancelling interchange agreements with these motor carriers, thereby precluding affected trucking firms from doing any more business with those shipping companies.

In one of the cases considered by the court of appeals, individual motor carriers challenged just such practices as outlined above, with respect to stripping container traffic within 50 miles of the ports of Baltimore and Hampton Roads, Virginia.[4] Responding to their charges,

[2] At different times since the advent of rules prescribing handling of containers, ILA has allowed certain work to be conducted by others in conformance with the rules. The complicated history of various ILA claims and rules as set forth in great detail by the court of appeals is basically accurate. Pet. App. 6a-22a.

[3] This agreement, governing the relationship between individual signatories from the motor carrier and shipping industries, provides in part I (4.1(a)) that subscriber carriers using interchanged equipment "shall have the right of complete control and supervision of equipment while in its possession and shall be responsible for returning the equipment in the same condition as received, normal wear and tear excepted."

[4] While the controversy involving these ports focused on stripping and stuffing "full shippers' load" containers destined beyond the

a majority of the National Labor Relations Board (NLRB) affirmed the rulings, findings, and conclusions of its Administrative Law Judge (ALJ), that the penalty provisions of the Rules on Containers and their enforcement by the ILA constituted an illegal secondary boycott, not permitted as merely furthering the preservation of their traditional work. Pet. App. 110a-118a.

Specifically, the ALJ found that "the traditional on-pier work of longshoremen has not included the work performed by the employees of motor carriers * * * at their off-pier facilities." Pet. App. 165a. The record developed before the ALJ (Pet. App. 139a-141a) conclusively demonstrated that, both before and after the advent of containerization, the longshoremen's role in packing and unpacking cargo ended at the head of the pier, while motor carriers were responsible for any such handling of the freight beyond that point. Pet. App. 164a. Critical to his determination on this issue, the ALJ found that, since containerization, motor carriers traditionally have transported containers to their terminals and utilized their own employees to transfer freight to truck trailers "whenever considerations of safe regulation, safety, or economy persuaded a motor carrier to take that precaution." Pet. App. 164a.

The court of appeals, by divided vote, reversed and vacated the Board's decisions, while remanding them to the NLRB for further proceedings. Pet. App. 1a. Chief Judge Wright, writing for the majority, found that "the NLRB committed reversible legal error by ignoring circumstances crucial to a responsible application of the Supreme Court's work preservation doctrine," enunciated

50-mile radius, the motor carrier industry's concerns over the ILA provisions include handling freight belonging to more than one consignee consolidated in a single container. Therefore, this brief is not limited to a discussion of the practical difficulties arising out of Nos. 77-1735 and 77-1758, reviewing *International Longshoremen's Ass'n*, 231 N.L.R.B. 351 (1977).

in *National Woodwork Manufacturers Ass'n* v. *NLRB*, 386 U.S. 612 (1967) and *NLRB* v. *Enterprise Ass'n of Pipefitters*, 429 U.S. 507 (1977). Pet. App. 50a. While contending that it has "no dispute with the Board's factual findings" (Pet. App. 59a), the court nevertheless faulted the Board's proper consideration of "all the surrounding circumstances." Pet. App. 45a-51a. Instead of accepting the Board's findings of fact, the majority found that the Board's reliance on the practical needs of trucking companies, which led to the pattern of stripping containers off-pier before transporting interchanged freight, was "immaterial." Pet. App. 49a.[5]

Subsequently, the court of appeals denied petitions for rehearing and suggestions for rehearing *en banc*, although four judges would have granted rehearing *en banc*. Pet. App. 88a.

ARGUMENT

The Court of Appeals Merely Substituted Its Judgment for the NLRB's In Determining All the Surrounding Circumstances Which Must Be Considered, Including Relevant Traditional Work Patterns, Under the Work Preservation Doctrine

While the basis asserted by the court of appeals for the decision under review is the NLRB's failure to interpret and apply properly the prevailing Supreme Court cases, the motor carrier industry takes strong issue with that conclusion. Indeed, we submit that close analysis of the court's opinion exposes a diametrically opposite reason

[5] The dissenting judge found that the NLRB had given proper consideration to the surrounding circumstances, including the relevant traditional work patterns. Pet. App. 79a-83a. His conclusion was based on the existence of substantial evidence in the NLRB's records, and was "fortified" by decisions in three other circuits adopting the same view of the ILA's work preservation claims, in addition to the D.C. Circuit's own *per curiam* enforcement of a similar NLRB order.

for its decision. The majority simply favors a contrary policy than that reflected in the Board's assessment of the totality of the circumstances surrounding the legality of the ILA's work rules for handling containerized cargo.[6] It is hornbook law that a reviewing court is not empowered to substitute its judgment for that of the agency. *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974).

In an effort to substitute what amounts to its policy judgment despite numerous contrary NLRB and court determinations, the majority resorts to a charade. While charging that the NLRB has failed to examine "all the surrounding circumstances" under *National Woodwork* and *Pipefitters*, in the same breath the court found that practical concerns of the motor carrier industry for economical and safe transportation of interchange freight are "immaterial" to defining the disputed work. Pet. App. 49a n. 173. In our view, "all the surrounding circumstances" means just that, not merely those factors which favor the ILA's claims to the work in controversy. Confronted by its own recognition (Pet. App. 57a) that reviewing courts are bound to uphold NLRB decision supported by substantial evidence, *Pipefitters*, 429 U.S. at 530-31, and the substantial evidence which exists on the record demonstrating the traditional work pattern in the motor carrier industry, *supra*, at 3-4, the majority cannot invalidate the Board's action on that ground.[7] As

[6] Evidence of this policy preference is found not only in the majority's slanted conclusion (Pet. App. 59a-61a), but also is stamped on its determination that these work rules are a "reasonable" attempt to deal with "an extremely thorny industrial issue: technological innovation versus job security." Pet. App. 50a, 53a-54a. Apparently the fact that off-pier stripping and stuffing by motor carrier employees, often represented by the International Brotherhood of Teamsters, grew up in parallel to the same work performed on-pier by ILA employees constitutes for the majority an "out of sight, out of mind" issue.

[7] Indeed, we note that an agency's determination would not be subject to reversal even if the administrative record might support conflicting conclusions. *Consolo* v. *FMC*, 383 U.S. 607, 620 (1966). As far as we know, ILA has not argued that this evidence produces arguably conflicting conclusions.

a result, the court is left to play its word game with this Court's legal test.

In spite of the court of appeals' strained effort to find that the NLRB's decisions rest on "erroneous legal foundations" (Pet. App. 59a), the motor carrier industry contends that the NLRB has properly considered the totality of the circumstances. This is particularly so with respect to the Board's examination of the reasons for the development of motor carrier work patterns on interchange freight. To the extent that the court is correct in arguing that containerization merely represents a change of equipment (Pet. App. 49a), that change has impacted as equally on motor carrier operations as it has on ILA practices.

In 1979 an estimated 30 million containers were interchanged in the United States, approximately half of them with motor carriers. The most recent container tonnage figures available show that in 1977 nearly 47.8 million metric tons of cargo were imported and exported through American ports, including San Juan, Honolulu, and Anchorage.[8] Clearly, these figures establish the magnitude of containerization and adequately suggest the important role of the intermodal system to the U.S. trade picture. In view of the increased trade deficit of $4.76 billion reported for January 1980 by the Commerce Department, which includes the cost of freight, the motor carrier industry believes that encouragement and facilitation of intermodalism is more important than ever. As intermodal interchange stands today, however, the sig-

[8] Exports and imports each account for roughly half of this tonnage, although the import figure is partially due to the fact that San Juan, Honolulu, and Anchorage are essentially domestic ports. The economies of Puerto Rico, Hawaii, and Alaska to a lesser extent, then, are largely dependent on water carrier service, much of which is container operations.

nificant economic and safety problems for the motor carrier industry alluded to earlier already act as inhibitors to free interchange. We submit that these problems could only be magnified or intensified by application of the court of appeals' decision.

The preponderance of container equipment in use today is compromised of either 20 or 40 foot long containers. Containers basically are metal boxes with thick, reinforced walls and floors, which produces a low cubic measurement and a high tare weight. Additionally, weight ratings for loading 20 foot containers run up to 49,000 pounds, while the maximum weight is 68,000 pounds for 40 foot containers.[9] In contrast, while the state of the art in the motor carrier industry is 45 foot trailers, the majority of trailers in use provide at least 40 linear feet of cargo space. Several critical problems stem from the physical size disparity which has grown up between containers, owned or leased by the shipping industry, and motor carrier trailers. Taken together, these factors result in an effective bar to the transportation of containers in most situations beyond a short movement to the carriers' terminals.[10]

At the outset, the obvious economic factor for motor carriers is the large amount of capacity (cubic footage) excess their trailers possess over containers. One 45 foot trailer contains approximately the same cubic measurement as three 20 foot containers. A 40 foot container may have about 30 percent less cube than the average

[9] International standards on container design dictate strength, size and capacity, which result in the limited internal cubic space and high tare weight. American National Standards Institute, Standard MH 5.1M-1979.

[10] A detailed explanation of the drawbacks of operating intermodal containers in domestic environments is found in a report by Richard A. Staley, *Intermodal, International Containerization—The Problem Areas,* published in the proceedings of the James W. Bennett, Jr. Memorial Seminar on "World Logistics: Key to World Trade," University of Tennessee, October 1978.

highway trailer. In a business where capacity often translates into revenues, carriers generally refuse to transport containers on chasis, except for short distances under 100 miles to their terminals for stripping, rather than be placed at a competitive disadvantage.

Both economic and safety problems arise from the twofold effect of container weights—tare and gross. Due to the relatively high tare weight of containers, plus the heavy chasis weight, carriers find it uneconomical to use this equipment over the road in place of their own trailers.

In order to remain within legal state weight limits for highways, carriers tendered containers on chasis must sacrifice as much as 3,000 pounds or more per movement, which most are unwilling to do. Furthermore, import freight loaded overseas usually utilizes, or even exceeds, the full international weight rating of the containers. When carriers are tendered these containers to transport, either as single 40 foot units or as two 20 foot containers on a chasis, there is no way to avoid exceeding state maximum weight laws without stripping the containers and utilizing trailers.[11]

Besides these physical constraints presented by containers, motor carriers encounter equally burdensome operational difficulties in transporting containers. For many motor carriers, interchange freight represents important traffic for balancing movements within their transportation systems, because the availability of both import and export traffic solves any natural imbalances which may exist. Nevertheless, as indicated previously, many carriers are reluctant to transport containers great distances from the port. Practical carrier operations help

[11] It should be clear from this discussion that carriers transporting containers on chasis create unnecessary fuel inefficiencies by essentially carrying less freight than can be moved in trailers with virtually no different expenditure of fuel.

to account for this result, as well as the economics of trailer capacity.

While carriers can handle containers to points they serve directly without losing control of the equipment, obviously they lose that control if interline or connecting carriers are used to serving secondary points. This can be an expensive problem for the trucking industry. Shipping company per diem charges, which now range from $8 to $40 per day on each container, accrue for a longer period and are the interchange carriers' responsibility.

But more onerous are the U.S. Customs regulations governing containers, particularly the limitation of one free loaded domestic movement allowed the motor carrier in order to reposition the container for its next export move. As discussed above, containers make extremely bad trailers, thus carriers find it difficult to utilize efficiently containers in their own operations. However, the potentially greater problem flows from the current non-uniform interpretations of this rule within the Customs Service. Carriers found to violate this rule can face a variety of fines and penalties, in addition to becoming subject to ad valorem and excise taxes on the containers. Existence of these risks lead most carriers to minimize their use of containers. By limiting movements to those between their terminals and the port, and utilizing their own employees to strip and stuff containers, carriers return the equipment quickly to the shipping company, achieve fuel and operational efficiency, and eliminate per diem charges and potential fines for container use.

Even as Congress is today considering new legislation for motor carrier regulation which would ostensibly improve the fuel efficiency of motor transportation and increase its level of productivity to the American economy, the court of appeals' decision would deprive the industry of those very advantages. Given the physical and operational constraints on motor carrier transportation of

cargo containers themselves, described above, it is fair to say that the present intermodal freight system would not survive if the court's decision is allowed to stand. Motor carriers participating in container traffic already have discovered that economy and safety factors dictate that containers not move great distances. Imposition of the ILA's fine system would severely handicap present carrier operations to the point where most transportation would cease.

This court inferentially recognized in *Pipefitters*, 429 U.S. at 524 n. 12, that the effective foreclosure of competing groups was properly a surrounding circumstances to be considered by the NCRB.[12] The motor carrier industry submits that such a foreclosure will take place if ILA employees are allowed to secure work not traditionally performed by them under the court of appeals' decision.

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[12] Again, we must stress that the court of appeals' ignored the existence of a rival bargaining unit, the Teamsters, whose parallel work pattern off-pier, along with other motor carrier employees, is jeopardized by the instant decision. Contrary to the court's view (Pet. App. 49a n. 173) all motor carrier work cannot practicably be transferred back to the pier. Container piers are land-intensive operations, and do not presently as a general matter involve sufficient "terminal" space to permit ILA employees to strip and stuff every containers handled today by motor carriers. The alternative, that motor carriers should hire ILA employees to perform off-pier work, is untenable for the obvious conflict it represents.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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